No. 02-1720

Supreme Court, U.S.
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In The

Supreme Court of the United States

AUTO STIEGLER, INC.,

Petitioner,

v.

ALEXANDER M. LITTLE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA") preempts the Supreme Court of California's holding that an employer must pay all arbitration forum costs in matters involving state law claims of wrongful termination in violation of public policy.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Employers Group, formerly known as Merchants Manufacturers Association and Federated Employers, is one of the nation's oldest and largest human resources management associations. Headquartered in California, it represents nearly 5,000 companies of all sizes and in every industry, employing in the aggregate approximately 2.5 million employees.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases like this one. For this reason, the Employers Group has been involved as *amicus* in many significant employment cases, including *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1999); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); and *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002).

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. The letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of this Court, the *amicus curiae* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, made a monetary contribution for the preparation or submission of this brief.

STATEMENT OF THE CASE

Respondent Little worked for Petitioner Auto Stiegler, Inc., an automobile dealership. He was terminated and subsequently filed suit for, *inter alia*, tortious wrongful termination in violation of public policy.

Little agreed to binding arbitration while employed by Auto Stiegler. The agreement was silent as to who would bear the costs of arbitration. The California Arbitration Act (the "CAA") provides that the parties will share the costs of arbitration unless they expressly agree otherwise. Cal. Code Civ. Proc. § 1284.2 (West 2003). Thus, by statute, the agreement provided that the parties would share arbitration costs.

Auto Stiegler's initial motion to compel arbitration was granted. Following the decision of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000), which held, among other things, that an employer must bear the costs of arbitration of a statutory discrimination claim, Little filed a request for reconsideration. On the motion for reconsideration, the trial court denied the motion to compel arbitration. Among the reasons the trial court gave for denying the motion was that sharing arbitration forum costs conflicted with the *Armendariz* decision. The Court of Appeals reversed, concluding in part that under this Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), silence as to who would bear the costs of arbitration was not a basis for invalidating the agreement. The California Supreme Court granted review, reversed the Court of Appeals and held that an employer must pay all arbitration forum costs in matters involving state law claims of wrongful termination in

violation of public policy. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064 (2003).

SUMMARY OF THE ARGUMENT

As the nation's oldest and largest human resources management association, the Employers Group is vitally concerned that judicial antagonism towards employment arbitration claims does not result in courts rewriting employment arbitration agreements or imposing conditions on some employment arbitration claims which are not imposed on all arbitration claims.

There is a clear-cut Congressional policy in favor of enforcing, as written, the terms of all arbitration agreements. This policy is incorporated into the FAA. The FAA provides that arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West 2003). Congress enacted the FAA "to assure those who desired arbitration . . . that their expectations would not be undermined . . . [in the] courts." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

The Supreme Court of California in this case holds that regardless of the agreement of the parties and the requirements of the state's arbitration act, every employment arbitration agreement contains an implied provision requiring employers to pay for all costs of arbitration of claims of wrongful termination in violation of public policy. This rule violates the FAA because it 1) does not enforce the agreement as written, by applying the statutory default rule, and 2) imposes a different rule on some arbitration claims which is not imposed on other claims.

The Supreme Court of California's decision is contrary to this Court's decision in *Volt Info. Scis., Inc. v. Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 475-79 (1989) that private agreements to arbitrate must be enforced according to their terms, and its decision in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) that courts may not place any restrictions on arbitration agreements that are not also placed on all other contracts.

There is a deep and mature conflict between various courts as to whether a court can impose on some types of arbitration claims a "one party pays all" rule for the costs of arbitration. The District of Columbia Circuit Court of Appeals has imposed an "employer pays all costs" rule on statutory employment discrimination claims but refused to impose such a rule on wrongful termination in violation of public policy claims. The California Supreme Court, the Ninth Circuit Court of Appeals and District Courts for Tennessee and New York have imposed a "one party pays all" rule for some types of arbitration claims. However, the Third and Fourth Circuit Courts of Appeals have rejected a categorical rule imposing a "one party pays all" rule for arbitration costs and found that such a rule violates the FAA by changing the written terms of arbitration agreements. This split among the courts has resulted in confusion for multi-state employers and their employees whose arbitration agreements may be enforceable as written for one type of claim but not another and enforceable in one court but not in another.

I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION OF WHETHER THE FEDERAL ARBITRATION ACT PERMITS A COURT TO IMPOSE A CATEGORICAL "ONE PARTY PAYS ALL" RULE ON SOME TYPES OF ARBITRATION CLAIMS.

Section 2 of the FAA provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. *See, e.g., Volt*, 489 U.S. at 478; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The decision of the Supreme Court of California in this case finds that every employment arbitration agreement contains an implied agreement that the employer must pay all costs of arbitration for claims of wrongful termination in violation of public policy. The court's decision violates the FAA by 1) in effect rewriting the agreement between the parties by implying a condition that the employer pay the costs of arbitration; and 2) singling out one type of arbitration claim for a rule which does not apply to other types of arbitration claims.

A. THE CALIFORNIA SUPREME COURT'S DECISION IS DIRECTLY CONTRARY TO THE BASIC PRINCIPLE OF THE FEDERAL ARBITRATION ACT THAT COURTS MAY NOT REWRITE ARBITRATION AGREEMENTS.

A basic Congressional goal in the FAA is the principle that such agreements may not be rewritten by the courts. Rather, state and federal courts must " 'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.' " *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479), *Doctor's Assocs.*, 517 U.S. at 688 (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983) (footnote omitted). The "basic objective" under the FAA is "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted).

The agreement here is silent as to costs. The CAA provides that in arbitration the parties will share costs unless they expressly agree otherwise. Cal. Code Civ. Proc. § 1284.2 (West 2003). Thus, by statute, each party is required to pay a *pro rata* share of the arbitration costs. Instead of applying this rule, the California Supreme

Court held that "an arbitration agreement to arbitrate a claim of wrongful termination contrary to public policy must be interpreted to implicitly include an agreement to proportion costs in a manner that is reasonable for the employee/claimant." *Little*, 29 Cal. 4th at 1081. Thus, in fact, the Court has rewritten every employment arbitration agreement in the State of California, whether the agreement provides for the allegation of costs or not, to require the employer to pay all costs for wrongful termination in violation of public policy claims. By imposing an "employer pays all rule" on all employment arbitration agreements, the California Supreme Court has rewritten not only the agreement in this case, but all California arbitration agreements in violation of the FAA.

This Court's decisions make clear that the FAA preempts state law that conflicts with the purposes of the FAA. *Southland Corp.*, 465 U.S. at 12-15; *Doctor's Assocs.*, 517 U.S. at 685. "[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. That policy, which is designed to combat long-standing judicial hostility to arbitration by ensuring enforcement of the actual agreements entered into by the parties, has been confirmed repeatedly by this Court in cases reviewing state and federal court arbitration decisions. *Doctor's Assocs.*, 517 U.S. at 688; *Mastrobuono*, 514 U.S. at 53-54.

The California Supreme Court's imposition of a one party pays all rule "without any *contractual* . . . directive to do so," unquestionably constitutes an "intrusion upon the contractual aspects of the relationship," and therefore violates the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to

their terms." *Volt*, 489 U.S. at 475-79; *accord E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002); *Doctor's Assocs.*, 517 U.S. at 688; *Mastrobuono*, 514 U.S. at 54; *Dean Witter*, 470 U.S. at 221; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *id.* slip op. at 1 (Thomas, J., concurring in judgment) (noting *Volt* "held that under the [FAA] courts must enforce private agreements to arbitrate . . . in accordance with their terms").

B. THE SUPREME COURT OF CALIFORNIA'S DECISION VIOLATES THE FEDERAL ARBITRATION ACT BY PLACING CONSTRAINTS ON CERTAIN ARBITRATION CLAIMS WHICH ARE NOT PLACED ON OTHER ARBITRATION CLAIMS.

The FAA, 9 U.S.C. § 2, mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

This decision creates a special rule for one class of arbitration claims – wrongful termination in violation of public policy claims – in direct violation of the FAA. Other arbitration claims, for example employment arbitration claims for breach of express and implied contract, are not subject to the "employer pays all" rule.

The Supreme Court of California attempts to avoid the FAA's requirements by claiming that an employee has an implied-in-law unwaivable right to have the employer pay all costs of arbitration in wrongful termination of public policy claims:

> "Thus, while we recognize that a party compelled to arbitrate such rights does not waive them, but merely 'submits to their resolution in an arbitral, rather than a judicial, forum' (*Gilmer*, *supra*, 500 U.S. at p. 26), arbitration cannot be misused to accomplish a de facto waiver of these rights. Accordingly, although the *Armendariz* requirements specifically concern arbitration agreements, they do not do so out of a generalized mistrust of arbitration per se (see *Doctor's Associates, Inc.*, *supra*, 517 U.S. at p. 687), but from a recognition that *some* arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights. The *Armendariz* requirements are therefore applications of general state law contract principles regarding the unwaivability of public rights to the unique context of arbitration, and accordingly are not preempted by the FAA. And, as discussed above, there is no reason under *Armendariz*'s logic to distinguish between unwaivable statutory rights and unwaivable rights derived from common law."

Little, 29 Cal. 4th at 1079.

The Court, however, provides no support for this proposition, nor can it, since it is expressly contrary to California statutory law. The default rule for arbitration costs in California, if the agreement is silent, is that the parties share the expenses. Cal. Code Civ. Proc. § 1284.2. The California Supreme Court ignores the default rule and instead creates a new "unwaivable right" out of whole cloth. Not only is *pro rata* sharing of costs not a violation of an unwaivable right, it is the stated policy of California law.

It is clear that states may not place any constraints on some agreements to arbitrate which are not placed on all other contractual agreements. *See*, *Southland Corp.*, 465 U.S. 1; *Perry v. Thomas*, 482 U.S. 483 (1987). In this case, the California Supreme Court has created a rule which on its face can only apply to arbitration agreements. This Court has struck down state laws which only restrict arbitration agreements. In *Doctor's Assocs.*, 517 U.S. at 687, this Court stated:

> "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce*, 513 U.S. at 281, 115 S.Ct., at 843; *Perry*, 482 U.S. at 492, n. 9, 107 S.Ct., at 2527, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (1995) (under *Southland* and *Perry*, 'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted')."

The Supreme Court of California's categorical rule cannot be justified as a legitimate application of equity law. There is no equitable right to have one party pay all arbitration costs. In fact, this Court recently held in *Green Tree*, 531 U.S. at 92, that a plaintiff seeking to invalidate an arbitration agreement on the grounds she could not afford the cost has the burden of demonstrating that the arbitration would be "prohibitively expensive." It is only the California Supreme Court's hostility to employment arbitration which makes sharing of cost a violation of an unwaivable equitable right.

Congress passed the FAA to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Volt,* 489 U.S. at 474. In the FAA, Congress recognized "the widespread unwillingness of state courts to enforce arbitration agreements." *Southland Corp.*, 465 U.S. at 13. By singling out one type of arbitration claim and applying a special rule which does not apply to all arbitration claims, the California court's decision violates the FAA's mandate that states may not place constraints on arbitration agreements which are not placed on all types of contracts.

II. IN SPITE OF THE CLEAR LANGUAGE OF THE FEDERAL ARBITRATION ACT AND THE DECISIONS OF THIS COURT, THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS AND THE CALIFORNIA SUPREME COURT IN REGARD TO WHETHER COURTS MAY IMPOSE A CATEGORICAL "ONE PARTY PAYS ALL" RULE WHICH ONLY APPLIES TO SOME TYPES OF ARBITRATION CLAIMS.

State and federal courts have split on whether a court can mandate a "one party pays all" rule for arbitration costs in some types of claims or whether they have to consider each case based upon its own merits.

A. THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS HAS IMPOSED AN "EMPLOYER PAYS ALL" RULE IN THE CASE OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS, BUT REFUSED TO IMPOSE AN "EMPLOYER PAYS ALL" RULE IN THE CASE OF WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY CLAIMS.

In *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (CADC 1997), decided before this Court's decision in *Green Tree*, the D.C. Circuit imposed an "employer pays all" rule, holding that "an employee can never be required . . . to pay an arbitrator's compensation in order to secure the resolution of statutory claims." *Id.* at 1468. The court wrote that there was "no reason to think that the [U.S. Supreme] Court would have approved arbitration in the absence of [an arrangement that employers pay all costs of arbitration]." *Id.* at 1484.

After *Green Tree*, the D.C. Circuit in *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C. Cir. 2001), faced a common law claim virtually identical to the issue here. While not ruling directly on whether *Green Tree* overruled *Cole*, the court refused to create an "employer pays all" rule in cases of wrongful termination in violation of public policy. The court reasoned that, even assuming *Cole* was still good law, arguments in favor of extending the "employer pays all" rule must still fail. *Id.* at 824. The court said if the public policy rationale were used to create an exception to the FAA,

> "it is hard to see what falls outside it. All claims not based on contract . . . implement values that society has in one way or another thought deserving. . . . In short, the proposed extension of *Cole* [to violation of public policy claims] would significantly alter the terms of the Federal Arbitration Act, imposing a serious procedural limit on a wide (but unpredictable) range of arbitration claims, all without the slightest signal from Congress."

Id. at 826.

B. THE THIRD AND THE FOURTH CIRCUIT COURTS OF APPEALS, THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AND THE FEDERAL DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA HAVE REFUSED TO ADOPT A BLANKET RULE REQUIRING ONE PARTY TO PAY ALL COSTS OF ARBITRATION AND INSTEAD HAVE REQUIRED COURTS TO REVIEW EACH CASE ON ITS FACTS.

In *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002), an employee alleged sexual harassment and discrimination. The employee tried to set aside the arbitration agreement she had signed, asking the Third Circuit Court of Appeals to find that "the mere existence of a fee-splitting provision in an [arbitration] agreement" satisfied the showing of "prohibitive costs" required by *Green Tree*. *Id.* at 610. The court refused to do so, rejecting an "employer pays all costs" rule and instead requiring review of the case on its facts. The court reasoned that to do otherwise "would be inconsistent with *Green Tree* and would run counter to the strong federal preference for arbitration and the liberal policy regarding arbitration." *Id.*

In *Bradford v. Rockwell Semiconductor Systems Inc.*, 238 F.3d 549 (4th Cir. 2001), the Fourth Circuit Court of Appeals also supported the review of each case on its facts. An employee alleged age discrimination and sought to avoid the arbitration agreement he had signed, claiming that the agreement's fee-splitting provision should automatically render the agreement unenforceable. Rather than adopting an "employer pays all" rule as the employee urged, the Fourth Circuit required a "case-by-case analysis that focuses, among other things, upon the claimant's

ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims." *Id.* at 556.

Similarly, the Federal District Court for the Eastern District of New York, in *Mildworm v. Ashcroft*, 200 F. Supp. 2d 171 (E.D.N.Y. 2002), concluded that, "based on *Green Tree*, the appropriate inquiry requires a case-by-case determination" rather than a blanket rule imposing costs on one party. *Id.* at 179.

The Federal District Court for the Middle District of Alabama held the same in *Boyd v. Town of Hayneville*, 144 F. Supp. 2d 1272 (M.D. Ala. 2001), noting that, in the absence of any binding authority from the Eleventh Circuit, the "court believes that the more prudent course, given the Supreme Court's recent decision in [*Green Tree*], is to follow the lead of those circuit courts which have declined to adopt [the 'employer pays all' rule]." *Id.* at 1280.

C. THE CALIFORNIA SUPREME COURT, THE NINTH CIRCUIT COURT OF APPEALS, THE FEDERAL DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AND THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK HAVE IMPOSED A BLANKET RULE THAT ONE PARTY MUST PAY ALL COSTS OF ARBITRATION FOR SOME TYPES OF CLAIMS.

In this case, the Supreme Court of California imposed a blanket "employer pays all" rule on the arbitration of all

terminations in violation of public policy arbitration claims. The Court relied upon its earlier decision in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000) which held that any agreement to arbitrate employment discrimination claims must meet certain minimum standards to be enforceable. One of those requirements is that the employer must pay all costs of the arbitration. In relying upon that case, the court said,

> "We recognize that 'in enacting §2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' The object of the *Armendariz* requirements, however, is not to compel the substitution of adjudication for arbitration, but rather to ensure minimum standards of fairness so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum.
>
> "Specifically with regard to arbitration costs at issue in this case and in *Brown* the principle that arbitration costs may prevent arbitration claimants from effectively pursing their public rights would apply with equal force to [wrongful termination in violation of public policy] . . . claims as to [employment discrimination] . . . claims or to federal statutory claims. Nothing in the FAA prevents states from controlling arbitration costs imposed by adhesive contracts so that the remedy of prosecuting state statutory or common law public rights through arbitration is not rendered illusory. The *Armendariz* costshifting requirement is unique to arbitration only to the extent

> that arbitration, alone among contract provisions, may potentially require litigants to expend large sums to pay for the costs of hearing that will decide his or her statutory other public rights. In other words it is not the arbitration agreement itself but the imposition of arbitration costs that under certain circumstances violate state law."

Little, 29 Cal. 4th at 1080 (citations deleted).

In *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2002), the Ninth Circuit Court of Appeals held that an agreement requiring arbitration of sexual harassment, retaliation, constructive discharge, and intentional infliction of emotional distress claims was procedurally and substantively unconscionable. Among the reasons the court relied upon was that the agreement required the employee to pay for the costs of arbitration. The Ninth Circuit said "The [arbitration agreement] . . . also requires the employee to split the arbitrator's fees with Circuit City. This fee allocation scheme alone would render an arbitration agreement unenforceable." *Id.* at 894.

In *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), the Ninth Circuit found that an arbitration agreement requiring an employee to arbitrate statutory discrimination claims was unconscionable for a number of reasons. One reason was the cost sharing provisions of the agreement; in that regard the court said:

> "By itself, the fact that an employee could be held liable for Circuit City's share of the arbitration costs should she fail to vindicate employment-related claims renders this provision substantively unconscionable. Combined with the fact that Circuit City's fee-splitting scheme would

> sanction charging even a successful litigant for her share of arbitration costs, this scheme blatantly offends basic principles of fairness. *See Ting*, 319 F.3d at 1151; *Armendariz*, 6 P.3d at 687-88, 24 Cal. 4th at 110-11. Because Circuit City's cost-splitting provision is harsh and unfair to employees seeking to arbitrate legal claims we conclude that it is substantively unconscionable."

Ingle, 328 F.3d at n.18.

The Federal District Court for the Northern District of New York held in *Ball v. SFX Broadcasting, Inc.*, 165 F. Supp. 2d 230 (N.D.N.Y. 2001), where an employee alleged discrimination on the basis of gender and pregnancy, that to avoid arbitration an employee need only "show a likelihood that he or she will be responsible for significant arbitrators fees, or other costs which would not be incurred in a judicial forum." *Id.* at 239.

The Federal District Court for the Middle District of Tennessee in *Cooper v. MRM Investment Company*, 199 F. Supp. 2d 771 (M.D. Tenn. 2002), where an employee alleged sexual harassment and constructive discharge, similarly allowed an employee to avoid arbitration. The court noted that employees "often cannot afford to pay the high costs of arbitration" and that this "might prevent [an employee] from being able to vindicate her federal statutory rights." *Id.* at 781-82. The court quoted with approval the language in *Ball* that "an employee need only show a likelihood that he or she will be responsible for significant costs . . . rather than focusing on that employee's specific financial situation." *Id.* at 781.

III. THE ISSUE OF WHETHER THE FEDERAL ARBITRATION ACT PERMITS STATE COURTS TO IMPOSE A "ONE PARTY PAYS ALL" RULE ON ONLY SOME ARBITRATION CLAIMS PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

Review by this Court of the decision of the Supreme Court of California is necessary to ensure the proper and uniform resolution of a recurring and important issue under the FAA that has generated a substantial conflict among federal and state appellate courts. Specifically, this case presents the question whether the FAA permits courts to impose a one party pays all rule on only some types of arbitration claims.

Where, as here, a court ruling conflicts with the express policy of Congress, as evidenced by the FAA, that ruling must be struck down just as if it were a state statute in conflict with a federal statute. Any other result would expose employers to the prospect of arbitration agreements being rewritten in various ways from circuit to circuit and state to state. The Court should hear this case in order to clarify this point and end the uncertainty. The question presented here is one of great practical importance. The division of authority has created great uncertainty for parties subject to arbitration agreements. Indeed, as lower courts have recognized, arbitration agreements often appear in form contracts that are employed or apply in more than one state. *Ingle*, 328 F.3d at 1171. As a result, a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside.

This Court has repeatedly acknowledged that the FAA's requirement that arbitration agreements be enforced according

to their terms is at the core of the FAA. *Volt* itself is a prime example of the Court applying this core FAA requirement in reviewing a decision of the California Court of Appeal. Specifically, this Court in *Volt* explained that ensuring enforcement of arbitration agreements according to their terms was the "federal policy" of the FAA, 489 U.S. at 476, "Congress' principal purpose" in enacting the FAA, *id.* at 478, and "the FAA's primary purpose," *id.* at 479. Similarly, in *Doctor's Associates, Inc. v. Casarotto*, this Court reviewed a decision of the Montana Supreme Court and stated that "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. at 688.

In short, there can be no doubt that the decision below presents a critical issue of great practical importance under the FAA, and that the acknowledged division on that question warrants further review by this Court.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to grant the Petition for Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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